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In the Supreme Court of the United States

OCTOBER TERM, 1979

IN RE: MULTI-PIECE RIM PRODUCTS LIABILITY LITIGATION
FIRESTONE TIRE & RUBBER COMPANY, PETITIONER

v.

JOHN C. RISJORD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether an order denying a motion to disqualify opposing counsel in a civil case between private parties may be appealed under 28 U.S.C. 1291, where the party moving for disqualification has never had an attorney-client relationship with opposing counsel on matters relating to the case that could be irreparably impaired by counsel's continued participation.

2. Whether, if such an order denying disqualification may be appealed, the district court properly denied the motion to disqualify in this case, where the clients to whom the attorney assertedly owed conflicting loyalties consented to the representation.

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INTEREST OF AMICUS CURIAE

This case presents important questions concerning the appealability of orders denying motions to disqualify counsel and the appropriate standards to be applied by a federal district court in ruling on motions to disqualify. Issues of attorney disqualification arise with some frequency in litigation involving the government. In both civil and criminal cases, it occasionally becomes necessary for the government to move for the disqualification of an attorney formerly employed by the government in connection with the same matter. See 18 U.S.C. 207; American Bar Association, *Code of Professional Responsibility*, DR 9-101(B). The government will also move for the disqualification of counsel representing multiple witnesses before a grand jury or potential targets of a grand jury investigation where counsel has a conflict of interest that could deny a particular witness vigorous and individualized representation and deprive the public and the grand jury of his testimony or cooperation. Similarly, the government will occasionally move for disqualification of counsel representing multiple defendants in a criminal trial in order to ensure protection of each defendant's Sixth Amendment right to the effective assistance of counsel and to preserve the integrity of the criminal justice process. Parties opposing the government in litigation sometimes move for disqualification of government counsel as well.

The outcome of this case could have a significant impact upon the disposition of disqualification issues in government litigation.

STATEMENT

1. Respondent Risjord is counsel for plaintiffs who have sued petitioner Firestone Tire & Rubber Company and other manufacturers of multi-piece truck tire rims in four separate actions seeking damages for personal injuries sustained as a result of alleged defects in the rims (J.A. 12, 28, 52, 60). These four cases are part of multidistrict proceedings consolidated in the United

States District Court for the Western District of Missouri pursuant to 28 U.S.C. 1407 (J.A. 73-80). At the time most of the injuries were sustained, Home Insurance Company (Home) was the liability insurer for petitioner under a policy that renders Home responsible for any liability in excess of a certain "deductible" amount, generally $50,000 (J.A. 150).

The plaintiffs represented by respondent alleged that petitioner (along with other defendants) had "negligently, willfully or intentionally" failed to redesign the rims knowing of their defects, to recall defective rims, to warn of hazards, and to advise the government of hazards and other pertinent information, and that petitioner had engaged in other conduct that caused the injuries or failed to prevent them (J.A. 14-15, 26, 30-32, 40-41, 52-54, 63-65). The plaintiffs also sought exemplary damages (J.A. 23-24, 38, 42, 54, 60, 66, 71-72).

By letters sent in October 1978 and November 1979, Home informed petitioner that Home's policy would not cover any award of compensatory damages to the plaintiffs represented by respondent based on willful or intentional acts by petitioner and would not cover any award of punitive damages (J.A. 113-116, 198-199). Home sent similar letters in April 1979 regarding suits brought by plaintiffs who were not represented by respondent (J.A. 117-123).

2. On May 29, 1979, petitioner moved in district court for the disqualification of respondent and his law firm, contending that respondent had a conflict of interest because Home, which could be liable under its insurance policy for damages awarded in this case, was a client of respondent's law firm (A. 104-106). The law firm listed Home as one of its clients in the Martindale-Hubbell Law Directory and had been employed by Home on a case-by-case basis in matters unrelated to the present case, but the firm did not receive a retainer fee from Home (Pet. App. 1-2). Respondent was defending Home in only one case at the time petitioner filed its disqualification motion—a suit on fire insurance policies against Home and five

other carriers in which Home held 10% of the total coverage. *Cannova Enterprises, Inc. d/b/a Mr. C's 103* v. *Home Insurance Co., et al.*, No. 782397 (Cir. Ct., Jackson Co., Mo.). See Pet. App. 2; J.A. 170-171.

On the basis of these facts, the district court concluded that petitioner would be required by Disciplinary Rule 5-105 of the *Code of Professional Responsibility*[1] to terminate his representation of plaintiffs in the instant litigation or his representation of Home in the *Cannova Enterprises* case, unless respondent's clients in each case consented to his continued representation (Pet. App. 2, 4-5). The court found it likely that there could be some "adverse effect," within the meaning of DR 5-105(A), on respondent's exercise of his independent judgment in one case or the other as a result of his taking a position adverse to Home in the present case, and that his representation in the two cases should therefore be undertaken only with the full knowledge and consent of his clients (Pet. App. 4-5).

Respondent subsequently filed an affidavit with the court stating that he had "fully informed" Home and the plaintiffs below "of the purported apparent conflict and the nature of the litigation involved therein, and has obtained their informed consent to continued representation" (J.A. 168-169). Respondent also filed affidavits of consent signed by a representative of Home and by his clients in this case (J.A. 170-183). After respondent filed the affidavits, petitioner filed a notice of appeal[2] from

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[1] DR 5-105 of the *Code of Professional Responsibility*, as adopted by the Missouri Supreme Court and incorporated in Rule 43 of the Local Rules of the District Court for the Western District of Missouri, is reproduced at Pet. App. 2-3.

[2] The district court, after making the requisite findings, certified its disqualification order for immediate appeal pursuant to 28 U.S.C. 1292(b). Respondent chose to obtain his clients' consent rather than appeal. Petitioner did not file an application with the court of appeals to permit an appeal of the district court's order, as required by 28 U.S.C. 1292(b), but instead filed the instant appeal under 28 U.S.C. 1291.

the district court's previous order permitting respondent's representation (J.A. 184-185).

3. On October 25, 1979, while its appeal to the Eighth Circuit in the present case was pending, petitioner filed an action against Home in the district court below alleging that Home's consent to respondent's representation of plaintiffs in the instant proceedings constituted a breach of fiduciary duty owed to it by Home (J.A. 21-221). Petitioner suggested in its complaint that Home's consent might have been motivated by its desire to aid respondent in establishing that petitioner committed intentional torts not covered by Home's insurance policies, and thereby to relieve Home of potential liability. Petitioner alleged as well that Home had demanded and received access to all of petitioner's rim and wheel case files and had discussed defense strategy in these cases with petitioner's attorneys. Petitioner asserted that potential collusion between Home and respondent could lead to a misuse of this information against petitioner (J.A. 218-220). Petitioner sought an order barring Home from disclaiming liability for compensatory and punitive damages in the instant litigation and preventing Home from giving its consent to respondent's representation, and an award of compensatory and punitive damages for respondent's alleged breach of fiduciary duty (J.A. 220-221). We understand that no decision has been reached in this separate action.

4. On November 6, 1979, also while the appeal in the present case was pending, Home sent respondent a letter requesting that he and his firm withdraw from their defense of Home in the *Cannova Enterprises* case because their participation in that case had given rise to an unwarranted expenditure of time and money in litigating the propriety of respondent's representation of plaintiffs in the present proceedings. Home stated in its letter, however, that respondent had not had and would not have access to information petitioner had furnished to Home regarding its products (J.A. 191-192; see also J.A. 171). Respondent promptly withdrew from his representation of Home in the case (J.A. 190), but not

from his representation of the other five carriers (Motion to Supplement the Record, at 2). The *Cannova Enterprises* case was resolved and dismissed with prejudice pursuant to stipulation of the parties filed in state court on May 28, 1980 (Motion to Supplement the Record, Exh. C). Neither respondent nor his firm has represented Home in any matter since they withdrew from the *Cannova Enterprises* case on November 7, 1979 (*ibid.*).

5. On appeal in the present case, the Eighth Circuit, sitting *en banc*, held in a brief opinion (Pet. App. 8-9) that an order denying a motion to disqualify counsel may not be appealed pursuant to 28 U.S.C. 1291 under the "collateral order" doctrine recognized by this Court in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949).[3] However, because the court overruled prior circuit precedent holding such orders appealable,[4] the court applied its holding prospectively and therefore reached the merits of the disqualification issue in the present case. In its one-sentence discussion of the merits, the court stated that it had "carefully reviewed the pleadings, and briefs" and "concluded that the district court did not abuse its discretion in refusing to disqualify counsel" (Pet. App. 10).

SUMMARY OF ARGUMENT

I

The order denying petitioner's motion to disqualify respondent was not immediately appealable under 28 U.S.C. 1291 because petitioner's claim could be adequately reviewed on appeal from an adverse final judgment.

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[3] The court stated (Pet. App. 9), however, that orders *granting* disqualification motions would continue to be appealable under the collateral order doctrine.

[4] See *Arkansas* v. *Dean Foods Products Co., Inc.*, 605 F.2d 380 (8th Cir. 1979); *Fred Weber, Inc.* v. *Shell Oil Co.*, 566 F.2d 602, 606-607 (8th Cir. 1977), cert. denied, 436 U.S. 905 (1978).

A. As an initial matter, there is a substantial question whether petitioner had standing to move for disqualification and to prosecute its appeal. The district court required respondent to obtain the consent of Home and plaintiffs below as a condition to his continued representation of plaintiffs in this case, out of concern that his independent judgment on behalf of plaintiffs below and of Home in the *Cannova Enterprises* case might be adversely affected by the simultaneous representation. We do not question petitioner's right to call to the district court's attention conduct by respondent that petitioner believed to be unethical. But once respondent's clients consented to the simultaneous representation in these private civil cases, it is not clear why petitioner—which is not and has never been a client of respondent on any matters related to either lawsuit—has legal standing to prosecute an appeal in order to deny plaintiffs below the counsel of their choice. DR 5-105 of the *Code of Professional Responsibility*, invoked by petitioner, was designed to protect the attorney's clients, not third parties.

Different considerations would be involved, however, in the case of joint representation of multiple defendants in a criminal trial or witnesses and targets in a grand jury investigation. In these circumstances, the government has standing to move for disqualification of counsel having conflicting interests and, where appropriate, to prosecute an appeal from a denial of the motion. Joint representation of defendants who have conflicting interests at trial can result in a violation of a defendant's Sixth Amendment right to effective assistance of counsel. In addition, beyond the personal rights at stake, there is a vital public interest in the integrity of our system of criminal justice that is not present in a dispute between private parties, and that integrity could be seriously undermined by conflicts of interest. Joint representation may also prevent one of several jointly represented defendants or grand jury witnesses from being adequately advised about the advantages of cooperating in an investigation or prosecution, where that coopera-

tion would entail the giving of evidence against others. For these reasons, the prosecutor—on behalf of the public and to see that justice is done—has a duty to move for disqualification to prevent conflicts of interest that threaten to obstruct the criminal justice process and has standing to prosecute an appeal.

B. The Court need not reach the standing question in this case, however, because it is clear that the order denying disqualification was not appealable pursuant to 28 U.S.C. 1291 under the "collateral order" doctrine of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), and its progeny. We may assume that the order satisfies the first two criteria of the *Cohen* test—i.e., that it addresses an issue separate from the merits of this products liability litigation, and that the district court conclusively determined the issue when it denied the motion for disqualification. But the order does not satisfy the third prong of the *Cohen* test, because petitioner's claim would not be irreparably lost if review were postponed to an appeal from a final judgment.

It is important to note in this regard that petitioner does not rest its disqualification claim on a past attorney-client relationship with respondent in the course of which confidential information relevant to the present case may have been disclosed. If that were the claim, it is arguable that review on appeal from final judgment would not be adequate because the parties and the court would be required to explore the attorney-client relationship to determine whether confidential information had affected the outcome of the case and because disclosures of confidences during the course of the first trial (or even the violation of the attorney-client relationship occasioned by the mere risk of such disclosure) could not be fully repaired if the court of appeals reversed and remanded for a new trial conducted by different counsel. Here, however, the claim is simply that respondent might advance its intentional tort theory (under which Home might not be liable on its insurance policy) rather than certain alternative theories. Petitioner's concern about

this possibility would be entirely mooted if petitioner were not found liable at all, or were held liable on grounds other than intentional tort. If petitioner *is* held liable on an intentional tort theory, that judgment could be reviewed on appeal. Such review could encompass petitioner's claim that it was prejudiced by respondent's alleged conflict of interest—a claim that would be far easier to assess with the benefit of a full trial record reflecting the manner of respondent's representation of the plaintiffs and the likelihood that such representation was improperly affected by a conflicting obligation to Home. Reversal on appeal from the final judgment would fully remedy any injury to petitioner from the asserted ethical violation.

Again, however, different considerations would be present where a district court denies the government's motion to disqualify a lawyer representing clients with conflicting interests in grand jury proceedings or in a criminal trial. The government has no right of appeal from the grand jury's failure to indict or from a judgment of acquittal. The disqualification issue would therefore be irreparably lost if the government could not prosecute an immediate appeal in the grand jury context or, to the extent it has appeal rights, prior to trial of a criminal case.

II

If the Court reaches the merits of the disqualification issue, we believe the court of appeals properly declined to reverse the district court's order denying disqualification in this case. In taking this position, we express no view on the ethical propriety of respondent's conduct.

Federal courts should disqualify an attorney in private civil litigation only where necessary to preserve the integrity of the judicial process in cases pending before them—such as where a conflict of interest undermines the court's confidence in the vigor of the attorney's representation on behalf of a party or where the attorney may be in a position to use confidential information against the other side. The courts may properly rely

on disciplinary proceedings to remedy other ethical improprieties by attorneys. We believe the district court acted properly in assuring itself that both plaintiffs below and Home were aware of and consented to respondent's simultaneous representation of them. In view of that consent, and in the absence of extraordinary circumstances not present here, the court of appeals did not err in declining to overturn the district court's order.

ARGUMENT

I

THE ORDER DENYING DISQUALIFICATION WAS NOT APPEALABLE UNDER 28 U.S.C. 1291 BECAUSE, EVEN ASSUMING PETITIONER'S STANDING TO PROSECUTE AN APPEAL, THE CLAIM FOR DISQUALIFICATION IN THIS CASE SHOULD BE REVIEWABLE ONLY ON APPEAL FROM FINAL JUDGMENT

A. It Is Doubtful That Petitioner Had Standing To Move For Disqualification and Prosecute An Appeal

Before turning to the question whether the district court's order denying disqualification was appealable under 28 U.S.C. 1291, there is a threshold question, argued by respondent below (Appellee Br. 14-17), whether petitioner has standing to prosecute this appeal.[5] The basis of the district court's order requiring respondent to obtain the consent of Home and the plaintiffs below as a condition to remaining in this case was its concern that respondent's simultaneous representation of Home in the *Cannova Enterprises* case, which concerned wholly un-

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[5] Another threshold question is whether the appeal is now moot in view of respondent's withdrawal from representation of Home in the *Cannova Enterprises* case and the subsequent termination of those proceedings. Petitioner contends (Pet. Br. 3-4 n.7) that these occurrences are of no moment because of what it characterizes as the "deeply rooted relationship" between respondent and Home and the possibility that respondent's conduct favoring Home in the present case could induce Home to give his firm business in the

related issues under a fire insurance policy, might adversely affect his judgment on behalf of the plaintiffs below (Pet. App. 2-5). We have considerable doubt that petitioner, which is not and has never been a client of respondent, is in a position to complain of such an alleged conflict of interest as it may affect others who *are* respondent's clients—particularly where, as here, the clients themselves have consented to the simultaneous representation [6] and there are no countervailing public interests weighing against multiple representation.

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future. Although the possibility of legally cognizable injury to petitioner seems somewhat speculative, we believe, on balance, that petitioner's assertions prevent the appeal from being moot.

[6] This case does not present an instance of *joint* representation of multiple parties in the same case, in which the attorney may be confronted with an obligation to take mutually inconsistent positions on behalf of his separate clients or advise a course of action for one client that could injure the interests of another. Where such an actual conflict exists, it would be obvious that the attorney cannot "adequately represent the interest of each" client. ABA *Code of Professional Responsibility*, DR 5-105(C). Under established ethical rules of the bar, a lawyer ordinarily should not continue his joint representation in such a case (DR 5-105(A) and (B)), although even then it is not clear that a court should enforce these rules by disqualifying the attorney upon the motion of the *opposing* party in a private civil action, where the attorney's own clients in the case have given their informed consent to the joint representation (see pages 26-30, *infra*). As explained in the text, it is also not clear that the opposing party would have standing to prosecute an appeal from a denial of a motion to disqualify in these circumstances.

The present case involves not joint representation of parties in the same case, but simultaneous representation of clients in different, wholly unrelated proceedings. This reduces the potential for a divergence of interests. *Cuyler* v. *Sullivan*, No. 78-1832 (May 12, 1980), slip op. 12. Although any position advanced by respondent on behalf of

We do not question the right—indeed the duty—of an attorney to call an ethical violation by opposing counsel to the attention of the court, even where that violation will have no effect upon the attorney opposing the violation, or upon his client. See, *e.g.*, *Melamed* v. *ITT Continental Baking Co.*, 592 F.2d 290, 294 (6th Cir. 1979). Nor do we question the inherent right of a district court to disqualify an attorney in appropriate circumstances when an ethical violation has been called to its attention, whether by a party to the litigation or by someone else. But where the only possible conflict of interest does not involve any breach of duty owed by the attorney to the party seeking his disqualification or otherwise implicate important public interests in the proceedings themselves, we question whether the moving party has standing, as such, to move for disqualification and to prosecute an appeal from the denial of the motion. *Ibid.*; *In re Yarn Processing Patent Validity Litigation*, 530 F.2d 83, 84-90 (5th Cir. 1976); *United States* v. *Partin*, 601 F.2d 1000, 1006 (9th Cir. 1979).[7]

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the plaintiffs below might redound to the detriment of Home *in this case*, that fact is not determinative because Home is not respondent's client in this case. There seems to have been virtually no possibility that factual or legal positions taken by respondent in the proceedings below would have effectively foreclosed respondent from taking any position on behalf of Home in the *Cannova Enterprises* litigation, in which Home was his client. Thus, the only inhibition on respondent's representation that could result from the simultaneous representation is that respondent might feel some subjective restraint in his advocacy on behalf of plaintiffs because of present or past (or, perhaps, prospective) affiliations with Home. Because these possible effects on the attorney are so subjective and difficult of proof in circumstances of simultaneous representation (where mutually inconsistent positions need not be taken), a court should be reluctant to override the consent of the clients on this ground.

[7] The standing issue would arise, of course, whether the appeal is taken from the order denying disqualification or from a final judgment in the case.

We assume, for present purposes, that petitioner has alleged sufficient injury-in-fact resulting from respondent's allegedly illegal conduct—*i.e.*, the possibility that respondent might highlight the intentional tort theory favorable to Home—to satisfy this aspect of the traditional standing test. See, *e.g.*, *Gladstone Realtors* v. *Village of Bellwood*, 441 U.S. 91, 99 (1979). However, this Court has developed certain prudential principles which place additional limitations upon the ability of persons to invoke the power of the federal courts. Under these principles, a litigant ordinarily must assert his own legal interests, rather than those of a third party, and must assert an injury that is peculiar to himself or to a distinct group of which he is a part, rather than one shared in substantially equal measure by all or a large class of citizens. *Id.* at 98-99; *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 263-264 (1977); *Warth* v. *Seldin*, 422 U.S. 490, 499-500 (1975).

Ethical rules, such as DR 5-105, governing conflicts of interest serve two purposes that might be furthered by granting a motion to disqualify counsel. Most immediately, these rules protect the interests of each individual lawyer's own clients. But petitioner is not and has never been respondent's client, and under the prudential limitations on standing just discussed, it does not appear that petitioner may rest its standing to raise and appeal the disqualification issue on the rights of third parties, plaintiffs below, who *are* respondent's clients. To be sure, petitioner alleges that it may be injured by respondent's conduct in this litigation if it is found liable on an intentional tort theory, and such an injury would be peculiar to petitioner. But DR 5-105 was not designed to protect an opposing party in litigation. Cf. *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 39 n.19 (1976); *Data Processing Service* v. *Camp*, 397 U.S. 150-157 (1970). Indeed, it has precisely the contrary purpose of ensuring a vigor-

ous presentation by counsel *against* the opposing party. Thus, it can be argued that a private party has no legal interest in his opponent's choice of counsel sufficient to confer standing.

Ethical rules respecting conflicts of interest also further the broader public interest in preserving the integrity of the bar and the confidence of the public in that integrity. Any injury petitioner might suffer as a result of an impairment of the integrity of the bar or public confidence, however, would not be distinct from the injury suffered by the public generally, and thus cannot furnish the basis for petitioner's standing here.

There are, moreover, substantial reasons to adhere to the prudential limitations on standing in a private civil case such as this. For where the party moving for disqualification does not rely on a possible impairment of his own attorney-client relationship with the particular attorney, but relies instead on a private attorney general theory to enforce the ethical rules of the bar, there is far greater cause for concern that the party has sought disqualification for tactical reasons or for purposes of delay. Such conduct itself would undermine the very integrity of the bar that ethical principles were designed to protect. If the court chooses not to disqualify counsel in such a case when an alleged ethical violation has been called to its attention, it may be preferable, on balance, to rely on established disciplinary procedures or other measures to further the public interest in preventing and remedying ethical violations, rather than conferring a right of appeal on the opposing party.

2. Quite different considerations are raised, however, where a single attorney or law firm represents multiple defendants in a criminal case or witnesses and targets in a grand jury investigation. In our view, where such joint representation gives rise to a conflict of interest, the government clearly has standing—through the public's Attorney General—to move for disqualification and to prosecute an appeal from a denial of such a motion.

A lawyer representing several criminal defendants who have conflicting defenses is required by established ethical principles to withdraw from the case, even where the defendants consent to the joint representation, because his clients' consent does not excuse the lawyer from his duty to exercise independent judgment on behalf of each or make it possible for him adequately to represent both. See *Cuyler* v. *Sullivan*, No. 78-1832 (May 12, 1980), slip op. 11 n.11, citing ABA *Code of Professional Responsibility*, DR 5-105 (1969); Geer, *Representation of Multiple Criminal Defendants: Conflicts of Interest and the Professional Responsibilities of the Defense Attorney*, 62 Minn. L. Rev. 119, 154-157 (1978).[8] The possible effect of such joint representation is of a wholly different order than that resulting from a conflict of interest in a dispute over private rights, as in the present case: joint representation of defendants having conflicting defenses in a criminal trial can result in the denial of a defendant's Sixth Amendment right to the effective assistance of counsel. *Cuyler* v. *Sullivan*, *supra*; *Holloway* v. *Arkansas*, *supra*; *Glasser* v. *United States*, 315 U.S. 60 (1942). Moreover, as the Court recently stated:

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[8] Indeed, Professor Geer, whose article was cited with approval by this Court in *Cuyler* v. *Sullivan*, *supra*, slip op. 11 nn.11 & 12, urges that joint representation be prohibited in all criminal cases and that the Code of Professional Responsibility be so construed. 62 Minn. L. Rev. at 157-162. This Court noted in *Cuyler* (slip op. 11 n.11) the strong policy against multiple representation espoused by most public defender offices responding to a recent survey. See also *Holloway* v. *Arkansas*, 435 U.S. 475, 486 n.8 (1978), quoting *ABA Standards Relating to the Administration of Criminal Justice, The Defense Function* § 3.5(b), at 123 (1974) (a lawyer should not undertake to defend more than one defendant where his duty to one "may conflict" with his duty to another; the potential for conflict is "so grave" that multiple representation should be avoided except where it is "clear that no conflict is likely to develop" and all defendants consent).

> [T]he purpose of a criminal court is not to provide a forum for the ascertainment of private rights. Rather it is to vindicate the public interest in the enforcement of the criminal law while at the same time safeguarding the rights of the individual defendant. The public interest in the accuracy and justice of criminal results is greater [in most cases than the public interest in the outcome of a particular civil trial].

Standefer v. *United States*, No. 79-383 (June 9, 1980), slip op. 14, quoting *United States* v. *Standefer*, 610 F.2d 1076, 1093 (3d Cir. 1979) (en banc). Thus, there is a vital public interest in the integrity of our system of criminal justice and of the defense bar—and in preserving the public confidence in that integrity—that is not present in a case between private parties. The prosecutor accordingly has an obligation, on behalf of the public and to ensure that justice is done, to move for disqualification of defense counsel who is confronted with a conflict of interest. Cf. *Berger* v. *United States*, 295 U.S. 78, 88 (1935).[9]

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[9] Individual defendants may be held to have *waived* their Sixth Amendment right to the effective assistance of counsel in the sense that they are not entitled to have their convicions set aside on appeal or collateral attack if they knowingly and intelligently agreed to joint representation by an attorney despite their being informed of the possibility that a conflict of interest might arise. This does not mean, however, that the district court, in advance of trial, is precluded from disqualifying defense counsel who is confronted with a conflict of interest merely because the defendants *consent* to joint representation in the face of the conflict. It is true that a defendant has a Sixth Amendment right to defend against criminal charges personally, without the assistance of counsel. *Faretta* v. *California*, 422 U.S. 806 (1975). We submit, however, that where the defendant chooses to be assisted by counsel, he does not have a Sixth Amendment right to counsel of his choice if that counsel has a conflict of interest that undermines the integrity of the criminal justice system and the defense bar. Cf. *United*

There is also a strong public interest in ensuring that the investigation and prosecution functions are not impeded by joint representation of defendants. As one commentator has observed:

> [T]he interests of a defendant who is either innocent or less culpable than another may lie in cooperation with governmental authorities. If, however, one attorney represents all defendants accused of a criminal offense, this cooperation will be made much more difficult to obtain since it is likely to involve testimony against other defendants. Thus collective advocacy may frustrate the interests of both the individual defendant and the public by allowing the defendants collectively to construct a stone wall to obstruct governmental attempts at achieving cooperation.

Geer, *supra*, 62 Minn. L. Rev. at 156.[10] As a result, where the government is prepared to discuss the possibility of cooperation by one of several defendants represented by common counsel, in return for a grant of immunity or other favorable treatment, the government has a sufficient stake on this ground alone to seek disqualification of counsel and to prosecute an appeal if an appeal otherwise lies. Cf. *In the Matter of the Special February 1977 Grand Jury*, 581 F.2d 1262, 1264 (7th Cir. 1978).

The government has a more pragmatic interest in pursuing disqualification motions in this setting as well. Absent a waiver, a finding that an attorney representing several defendants had an actual conflict of interest will result in reversal of the conviction under the Sixth

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States v. *Dolan*, 570 F.2d 1177, 1183 (3d Cir. 1978); but see, *e.g.*, *In re Taylor*, 567 F.2d 1183, 1186-1187 nn. 1 & 2 (2d Cir. 1977); *United States* v. *Garcia*, 517 F.2d 272, 276-277 (5th Cir. 1975).

[10] This concern is especially pronounced where one of the jointly represented defendants is in a position to dominate or intimidate co-defendants and to enlist the aid of counsel to this end.

Amendment. *Holloway* v. *Arkansas*, *supra*.[11] The prosecution must bear the burden of retrial even where it is not responsible for the constitutional violation. *Cuyler* v. *Sullivan*, *supra*, slip op. 7-9. The government's interest in the integrity of a judgment of conviction therefore also gives it a sufficient stake in the conflict of interest issue to pursue disqualification motions and, where possible, appeals from their denial.

Similar interests, conferring standing on the government, are at stake when an attorney represents a number of witnesses, targets, or a combination of both in connection with a grand jury investigation. Difficult questions may arise, for example, as to whether a particular witness or target should assert his Fifth Amendment privilege against self-incrimination. Although the Sixth Amendment right to effective assistance of counsel does not attach where an individual has not been indicted or formal criminal proceedings have not otherwise been initiated against him (*Brewer* v. *Williams*, 430 U.S. 387, 399 (1977)), the potential for criminal liability requires the attorney to be as sensitive to possible conflicts of interest when his client is called to testify before a grand jury or is under investigation as he would be after indictment. There is also an important public interest in preserving the integrity of legal representation in connection with grand jury proceedings and ensuring that joint representation of grand jury witnesses does not, through stone-

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[11] Reversal may occur even where the defendants purported to waive their Sixth Amendment right to effective assistance of counsel, if a court should later conclude that the waiver was not knowing and voluntary. Cf. *Blackledge* v. *Allison*, 431 U.S. 63 (1977). It is not apparent, however, that a final judgment in a civil case against one of several parties represented by the same attorney would be so readily reversed on appeal merely because the attorney had a conflict of interest in representing that party, at least where the prevailing party bore no responsibility for the conflict of interest. In the civil area, a suit by the losing party against his attorney for malpractice could provide full relief.

walling, impede the grand jury in pursuit of its right to obtain every person's evidence. *United States* v. *Nixon*, 418 U.S. 683, 709 (1974).[12] Such conduct could "frustrate the public's interest in the fair and expeditious administration of the criminal laws." *United States* v. *Dionisio*, 410 U.S. 1, 17 (1973). See *In the Matter of the Special February 1977 Grand Jury*, *supra*, 581 F.2d at 1264; *In re Investigation Before the February 1977, Lynchburg Grand Jury*, 563 F.2d 652, 658 (4th Cir. 1977).

B. The Order Denying Disqualification In This Case Was Not A "Collateral Order" Appealable Under 28 U.S.C. 1291

The Court need not decide the standing issue in this case, however, because the order denying disqualification was not immediately appealable under 28 U.S.C. 1291 in any event.

1. Because an order denying a motion to disqualify counsel obviously does not terminate the litigation, such an order is appealable only if it falls within the "collateral order" exception to the final judgment rule articulated by the Court in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). See *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 467-468 (1978). To qualify as a decision excepted from the final judgment rule by *Cohen*, an order "must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand* v. *Livesay*, *supra*, 437 U.S. at 468, citing *United States* v. *MacDonald*, 435 U.S. 850, 855 (1978); *Abney* v. *United States*, 431 U.S. 651, 658 (1977).

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[12] Nor can there be any serious suggestion that a motion by the government to disqualify counsel representing a number of grand jury witnesses or targets would be used for purposes of delaying the proceedings. Such an appeal would be intended to *further* the purposes of the grand jury investigation.

As explained below, we believe certain orders denying disqualification are appealable, because of the nature of the particular claim underlying the party's request for imposition of the disqualification remedy. But we do not believe petitioner's claim falls in that category.[13]

We may assume that the issue of disqualification of counsel here is separate from the merits of the underlying products liability litigation (but see note 17, *infra*) and that the district court "conclusively determined the disputed question" when it ruled that respondent could continue his representation in this case if he obtained the consent of Home and the plaintiffs below. But the order in this case does not satisfy the third criterion of the *Cohen* test, because the particular claim asserted by petitioner will not be irreparably lost if review is postponed to an appeal from final judgment.[14]

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[13] This Court has indicated that the appealability of orders under the collateral order doctrine should be decided in terms of categories, not on a case-by-case basis (*United States* v. *MacDonald, supra,* 435 U.S. at 857-858 n.6, citing *Carroll* v. *United States,* 354 U.S. 394, 405 (1957)). But there is no more reason to view all denials of motions to disqualify counsel as part of a single "category" of orders subject to a uniform rule of appealability than there is to treat all denials of motions to dismiss an indictment as part of a single category. Compare *Abney* v. *United States, supra* (refusal to dismiss indictment on Double Jeopardy grounds appealable) with *United States* v. *MacDonald, supra* (refusal to dismiss indictment on Speedy Trial grounds not appealable). The courts should instead look to the nature of the claim underlying the particular disqualification motion.

[14] Although language in *Cohen* can be read to suggest that the order appealed from must address a significant, unsettled legal question (337 U.S. at 547), and several courts have so interpreted *Cohen* (see, *e.g., Armstrong* v. *McAlpin, supra,* slip op. 3706-3707 & n.11; *In re Corrugated Container Antitrust Litigation,* 611 F.2d 86, 87 (5th Cir. 1980); *Grinnell Corp.* v. *Hackett,* 519 F.2d 595, 597-598 & n.4 (1st Cir.), cert. denied, 423 U.S. 1033 (1975)), decisions by this Court subsequent to *Cohen* have not stressed such a limitation. See

The only injury petitioner suggests it might sustain as a result of respondent's representation of plaintiffs here is that it might be held liable on an intentional tort theory that would not be covered by Home's insurance policy (Pet. Br. 4-5, 37, 44). This alleged injury is, in our view, far too speculative to support an appeal at this stage of the proceedings. There is every possibility, for example, that petitioner will not be found liable at all, or at least not on the intentional tort theory plaintiffs have alleged (along with causes of action sounding in negligence and strict liability).[15] If this were to happen, petitioner's objections would be wholly mooted.

Moreover, we see no reason why petitioner's claim for disqualification, to the extent it has any merit, could not be considered fully on appeal from an adverse judgment finding it liable in intentional tort.[16] If the court of appeals found the intentional tort theory itself to be without legal merit, it could reverse the judgment, thereby mooting petitioner's objection. If the intentional tort theory were found to be valid, it is not clear how peti-

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Abney v. *United States, supra,* 431 U.S. at 658, 660; *United States* v. *MacDonald, supra,* 435 U.S. at 857-858 n.6 (right of appeal not dependent on facts of case, but defined in "categories" of appealable orders). See also *In re Cessna Distributorship Antitrust Litigation,* 532 F.2d 64, 67 (8th Cir. 1976).

[15] Moreover, if respondent's "highly unusual" theory of intentional tort (Pet. Br. 4) is as groundless as petitioner implies, it can move to dismiss the complaint for failure to state a claim on which relief can be granted or for partial summary judgment. Fed. R. Civ. P. 12(b)(6) and 54(b). In any event, the burden of having to go to trial on a possibly invalid claim is no basis for classifying an order as collateral.

[16] Petitioner asserts (Br. 18) that deferral of the question to appeal from final judgment would not be appropriate because, "[a]s a practical matter, the extent to which the taint complained of has affected the proceedings is likely to be immeasurable." But petitioner makes no effort to explain why this would be so.

tioner could claim on appeal to have been unfairly prejudiced by respondent's assertion of that theory on behalf of his clients. But, in any event, the court of appeals would have before it the entire record in the case and could determine whether respondent has advanced all of his alternative theories of liability—including negligence and strict liability—in the forceful fashion his ethical obligations required. If he did not, the court of appeals could remand for a new trial conducted by new counsel if the court concluded that petitioner were entitled to that relief.[17] A new trial would fully vindicate petitioner's interest.

If petitioner believes after trial that Home has aided respondent in his presentation of the intentional tort theory, it will have a complete remedy in the action it has already filed against Home for breach of fiduciary duty (see page 4, *supra*). This separate action would also be a fully adequate forum in which petitioner could advance its argument that Home's fiduciary duty to petitioner prevented it from giving effective consent to respondent's representation of plaintiffs below (Pet. Br. 39, 42-45). We therefore do not believe the order in this case was appealable pursuant to 28 U.S.C. 1291 under the "collateral order" doctrine.[18]

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[17] Indeed, because the nature of petitioner's claim is related to the manner in which respondent will present the case, it could be argued that the claim is not wholly separate from the merits under the first prong of the collateral order doctrine (compare *United States* v. *MacDonald, supra,* 435 U.S. at 859-860) and that it could be *better* reviewed on appeal from final judgment.

[18] Another consideration weighs against recognizing a right of appeal in these circumstances. Where the motion for disqualification is based on the existence of a prior attorney-client relationship with the attorney (see pages 22-24, *infra*), that relationship constitutes an objective factor on which the right of appeal can be based and provides some assurance that the appeal is not wholly for delay. See *United States* v. *MacDonald, supra,* 435 U.S. at 862-863, comparing

2. Although we do not believe that the order denying disqualification in this case was appealable under 28 U.S.C. 1291, a strong argument can be made that other categories of orders denying disqualification should be appealable under the collateral order doctrine. One such situation is where there is a possibility that confidential information will be used against a former client.

Where an attorney represents a client against another party in a matter that is substantially related to a case in which he previously represented that other party, there is a possibility that he may be able to use confidential information obtained in the course of the prior representation to the detriment of his former client. Courts have uniformly ordered disqualification in such cases. See, *e.g.*, *Musicus* v. *Westinghouse Electric Co.*, No. 79-1067 (5th Cir. July 15, 1980); *Trone* v. *Smith*, No. 77-1832 (9th Cir. June 23, 1980), slip op. 3821; *Church of Scientology of California* v. *McLean*, 615 F.2d 691, 692 (5th Cir. 1980); *General Electric Co.* v. *Valeron Corp.*, 608 F.2d 265, 267 (6th Cir. 1979); *Novo Terapeutisk Laboratorium* v. *Baxter Travenol Laboratories, Inc.*, 607 F.2d 186, 195-196 (7th Cir. 1979) (en banc); *Fund of Funds, Ltd.* v. *Arthur Andersen & Co.*, 567 F.2d 225, 235 (2d Cir. 1977). See ABA *Code of Professional Responsibility*, Canon 4; see also DR 9-101(B); 18 U.S.C. 207 (similar provisions applicable to former government attorneys). The courts will not attempt to determine what confidential information was actually disclosed in the course of the prior representation, because to do so would itself intrude into the attorney-client relationship. See, *e.g.*, *Trone* v. *Smith*, *supra*, slip op. 3822; *Westinghouse Elec. Corp.* v. *Gulf Oil Corp.*, 588 F.2d 221, 224 (7th Cir. 1978); *Emle Industries, Inc.* v. *Patentex, Inc.*, 478 F.2d 562, 571 (2d Cir. 1973); ABA Committee on Professional Ethics, *Formal Opinion 342*, 62 A.B.A.J. 517 & n.6 (1976). A "substantial relationship" between the matters

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Abney v. *United States*, *supra*. No objective factor furnishing such tentative assurance is present here.

is thought to create a sufficient risk of disclosure of confidential information to warrant disqualification.

Arguably an immediate appeal should lie under 28 U.S.C. 1291 where the district court denies a motion to disqualify counsel based on an asserted breach of a prior attorney-client relationship in this fashion, because the court of appeals may not be able effectively to remedy the breach on appeal from a final judgment. Unless a per se rule of reversal were adopted, the court of appeals presumably would not reverse a final judgment against the former client unless it found that the ethical violation actually affected the outcome of the case, such as where the attorney used critical evidence that had been received in the course of the prior representation against the former client. But the former client would be required to disclose the details of the prior representation in order to make such a showing. It was to avoid this very breach of the attorney-client relationship that Courts have adopted the prophylactic rule described above, requiring disqualification wherever there is a "substantial relationship" between the first and second cases.[19] There is no reason why less deference should be owed that relationship on appeal from final judgment.

Second, even if the court of appeals were to reverse the judgment against the former client and order a new trial involving different counsel, this may not be an adequate remedy for the breach of the attorney-client relationship. The opposing party would often still possess confidential information that he could pass on to his

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[19] Difficult questions of proof would arise as well, because the attorney could be expected to argue that he learned the information in the course of representing his second client in the later case, or that the information would have been obtained from the prior client or other sources through discovery in the second case in any event. Issues of derivative use of confidential information would be even more difficult of proof. And, of course, resolution of these issues would require a breach of the attorney's confidential relationship with his second client as well as that with his first.

new attorney. Other persons, not parties to the case, might also have obtained access to confidential information through its disclosure at trial, and this publicity could never be undone.

Finally, the prophylactic rule of disqualification fashioned by the courts of appeals where the attorney may be in the possession of useful confidential information obtained in prior representation is designed to protect against the risk, not merely the actuality, that such information will be disclosed. Cf. *Abney* v. *United States*, *supra*, 431 U.S. at 661. The rule thereby serves to preserve the client's trust in the enduring sanctity of his relationship with his attorney. The injury to that trust and the insecurity of going to trial against a party represented by counsel who possesses damaging confidential information can never be fully remedied by a later reversal of an adverse judgment. Cf. *id.* at 661-662. And, of course, an appeal would never be an effective remedy where the particular case is settled or trial results in a judgment in favor of the party who sought disqualification of the lawyer who previously represented him.

For the foregoing reasons, we believe a reasonable argument can be made that orders denying disqualification where confidential information received in a prior attorney-client relationship may be disclosed should be immediately appealable under 28 U.S.C. 1291. The Court need not address that issue here, however, because, as petitioner concedes (Pet. Br. 4 n.10),[20] no issue of attorney confidences is presented here.[21]

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[20] The district court's order in this case was premised on DR 5-105, which governs simultaneous representation and independence of judgment, not Canon 4, which concerns attorney confidences (Pet. App. 1-5).

[21] Petitioner does assert that *Home* received confidential information regarding these product liability cases and that Home's attorneys discussed strategy in these cases with petitioner's attorneys (Br. 4 n.10; J.A. 104, 218-220; see page 4, *supra*). But because respondent has not represented Home or petitioner in any matters relating to the

We also believe that different considerations, warranting immediate appeal, are present when a question of multiple respresentation arises in a criminal case or before a grand jury. As explained above (see pages 13-18, *supra*), the government's unique posture and responsibilities confer upon it an interest to move for disqualification and to prosecute an appeal in these circumstances that is distinct from and superior to that of private civil litigants. More important for purposes of the appealability question, however, is the fact that the claim for disqualification would be irreparably lost if the government were not allowed a right of immediate appeal.

The failure of a grand jury to indict or its return of no true bill resulting from "stonewalling" by jointly represented witnesses ordinarily would not constitute a final judgment from which an appeal can be taken under 28 U.S.C. 1291. The only means available for the government to obtain review of an order denying a motion to disqualify is therefore an appeal of the disqualification order itself. See *In the Matter of the Special February 1977 Grand Jury*, *supra*, 581 F.2d at 1264. This avenue of appeal is all the more desirable in view of the uncertainty regarding the availability of 28 U.S.C. 1292(b) in the grand jury setting, which turns on whether a grand jury proceeding is a "civil action" for purposes of that provision.[22] Compare *In re April 1977 Grand Jury Sub-*

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instant litigation, Home's possession of confidential information cannot be imputed to respondent. The prophylactic rules of disqualification based on attorney confidences are therefore inapplicable. Moreover, if Home did disclose information pertinent to these cases, petitioner would have a complete remedy in its action for breach of fiduciary duty against Home.

[22] Moreover, given the appropriate limitations on the court of appeals' exercise of its mandamus jurisdiction under 28 U.S.C. 1651 (see *Will* v. *Calvert Fire Ins. Co.*, 437 U.S. 655 (1978); *Kerr* v. *United States District Court*, 426 U.S. 394 (1976); *Will* v. *United States*, 389 U.S. 90 (1967)) mandamus would not be an adequate remedy in any but the most extraordinary circumstances.

poenas, 584 F.2d 1366 (6th Cir. 1978), cert. denied, 440 U.S. 934 (1979) (appeal not available), with *In re Grand Jury Proceedings*, 580 F.2d 13, 17 (1st Cir. 1978), and *In the Matter of the Grand Jury Subpoena Served on John Doe*, 546 F.2d 498, 507-502 (2d Cir. 1976) (assuming appeal available, without discussion); see also Note, *Appealability of Orders Relating to Ongoing Grand Jury Proceedings*, 92 Harv. L. Rev. 931 (1979).

Because of the Double Jeopardy Clause, the government also ordinarily has no right of appeal from a judgment of acquittal in a criminal case. It would therefore never have an opportunity to obtain review, after final judgment, of a district court order allowing joint representation that may, for example, have prevented a particular defendant from cooperating with the government. Thus, in contrast to that of a private litigant, the government's appeal would satisfy the third prong of the *Cohen* test.[23]

II

THE COURT OF APPEALS PROPERLY DECLINED TO OVERTURN THE DISTRICT COURT'S ORDER ON THE MERITS

If the Court reaches the merits in this case, we believe the court of appeals properly declined to reverse the district court's order denying petitioner's motion to dis-

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[23] There would remain a question whether a statutory right of appeal would exist because of the possibility that the government's appeal rights in criminal cases are more limited than those of private parties generally. Appeal of a denial of disqualification would not appear to fall within 18 U.S.C. 3731, but there is authority for the proposition that, at least in some circumstances, the government may invoke 28 U.S.C. 1291 as a basis for an appeal even in a criminal case (see *Carroll* v. *United States*, 354 U.S. 394, 403 (1957); *United States* v. *Denson*, 588 F.2d 1112, 1126 (5th Cir. 1979), vacated on other grounds, 603 F.2d 1143 (5th Cir. 1979) (en banc)). We believe the right of appeal under Section 1291 would be clearest in cases satisfying the requisites of the collateral order doctrine.

qualify. In taking this position, however, we express no view on whether it is appropriate under applicable ethical standards for respondent to represent the plaintiffs below, in light of his past relationship with Home or the alleged possibility of such a relationship in the future. For even if respondent has violated these standards, we agree with the view of the Second Circuit in *Armstrong* v. *McAlpin*, *supra*, slip op. 3718-3723, that district courts should not reflexively disqualify counsel whenever a violation of applicable rules of ethics appears.[24]

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[24] The district court in the present case incorporated in its local rules the *Code of Professional Responsibility* adopted by the Supreme Court of Missouri, which, insofar as DR 5-105 is concerned, is patterned after the ABA Code (Pet. App. 2-3). It does not appear that the district court perceived any difference among these provisions (J.A. 153). There is therefore no occasion to consider here whether the applicable rule of decision in a case such as this is a uniform federal rule, a standard incorporated by the district court in its local rules, or adoption of state law. On many issues regarding attorney qualifications and practice in federal court, it is appropriate to follow state law, because the great majority of attorneys practicing before the court would also be members of the bar of the state in which the court sits. Moreover, where, as here, federal jurisdiction is premised on diversity of citizenship, it may be appropriate to look to state law on disqualification questions as well.

In other cases, however, a uniform federal rule is required. Contrary to the reasoning of the Third Circuit in *United States* v. *Miller*, No. 79-2445 (June 26, 1980), slip op. 8-12, for example, we do not believe it is appropriate to look to state law to determine when an attorney formerly employed by the federal government is disqualified under DR 9-101(B) of the *Code of Professional Responsibility*. Rules in this area have the effect of imposing additional terms and conditions on federal employment, an area in which Congress has pervasively regulated. See 18 U.S.C. 207. Differing state rules could upset the delicate balance Congress has struck between the need to protect the government in its litigation

The ABA *Code of Professional Responsibility* was intended to be implemented administratively and to be enforced through disciplinary proceedings brought against the individual attorney. Its various disciplinary rules, including DR 5-105, were not intended to be rigid rules of procedure in civil or criminal cases, slip op. 3723 n.26; Sutton, *How Vulnerable Is the Code of Professional Responsibility?* 57 N.C. L. Rev. 497, 514-516 (1979),[25] although the Code may of course provide useful guidance to a court in passing on procedural matters, such as disqualification motions. Thus, an asserted violation of a disciplinary rule should not inexorably lead to disqualification in a particular case.

Disqualification has an immediate adverse effect on the client by separating him from counsel of his choice. Judicial caution is particularly appropriate because disqualification motions may be interposed for tactical reasons. And even where made in good faith, such motions cause some delay in proceedings. *Armstrong* v. *McAlpin*, *supra*, slip op. 3718-3719, quoting *Board of Education* v. *Nyquist*, 590 F.2d 1241, 1246 (2d Cir. 1979). For these reasons, we agree with the Second Circuit that courts should disqualify counsel only "where necessary to preserve the integrity of the adversary process in actions

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and the ability to attract qualified attorneys to government service.

We also believe that uniform federal standards, not adopted state law, must govern the ethical obligations of U.S. Attorneys and defense counsel in federal criminal prosecutions. See, *e.g.*, DR 7-104 (attorney communication with party represented by counsel). In such circumstances, the applicable provision of the ABA Code, presumably reflecting a consensus of the legal profession, may inform the court's judgment, but should not, of course, be dispositive.

[25] The preamble to the Discussion Draft of the Model Rules of Professional Conduct prepared by the ABA's Commission on Evaluation of Professional Standards expressly states that the standards there proposed are designed to be used for disciplinary purposes but not necessarily in collateral judicial proceedings.

before them"—*e.g.*, where an attorney's conflict of interest undermines the court's confidence in the vigor of his representation of his client or where the attorney is at least potentially in a position to use privileged information concerning the other side that was acquired through prior representation. *Ibid.* The present case plainly does not fall in the latter category, and we do not believe that the record at this stage compels the conclusion that respondent will not vigorously represent the plaintiffs in the proceedings below.

We believe it was entirely appropriate for the district court, once a possible ethical violation was called to its attention, to satisfy itself that the plaintiffs below and Home consented to respondent's representation. But in civil litigation such as this, informed consent of the clients to simultaneous representation should ordinarily dispose of a disqualification motion filed by an opposing party who has had no attorney-client relationship with the attorney, absent extraordinary circumstances not present here. See, *e.g.*, *Aetna Casualty & Surety Co.* v. *United States*, 570 F.2d 1197, 1202 (4th Cir. 1978).[26] Because the district court's order declining to disqualify respondent appears to be consistent with the principles just discussed, there is no occasion for the Court to consider whether the court of appeals was correct in apply-

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[26] As we have previously pointed out, disqualification motions filed in criminal cases and grand jury proceedings stand on a different footing because of the strong public interest ingredient in criminal prosecutions, the constitutional rights at stake, the possibility that joint representation will prevent cooperation by defendants and suspects, and the burden on the criminal justice system of retrials. Because of the interests at stake, disqualification of an attorney having conflicting interests would often be appropriate in these cases even where the defendants or witnesses purport to consent to joint representation. *Cuyler* v. *Sullivan*, *supra*, slip op. 11. See page 14, *supra;* see also *In re Gopman*, 531 F.2d 262 (5th Cir. 1976).

ing an "abuse of discretion" standard of appellate review in this case.[27]

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[27] There is some divergence among the courts of appeals regarding the precise standard of appellate review to be applied in attorney disqualification cases. Some courts, like the court below, have announced an abuse of discretion standard, although even these courts do not hesitate to reverse where the district court misperceived the applicable legal standard. See, *e.g.*, *Trone* v. *Smith*, *supra*, slip op. 3822-3823; *Armstrong* v. *McAlpin*, 606 F.2d 28, 34 n.7 (2d Cir. 1979) (panel decision). Other courts have held that, at least where the facts are not in dispute and only legal issues are involved, the district court does not enjoy any particular advantage over appellate courts in the formulation and application of ethical norms and that an abuse of discretion standard of review in such cases is inappropriate. *Novo Terapeutisk Laboratorium* v. *Baxter Travenol Laboratories, Inc.*, *supra*, 607 F.2d at 188-189 (panel decision); *Aetna Casualty & Surety Co.* v. *United States*, *supra*, 570 F.2d at 1200; *Woods* v. *Covington County Bank*, 537 F.2d 804, 810 (5th Cir. 1976); *Kroungold* v. *Triesler*, 521 F.2d 763, 765 n.2 (3d Cir. 1975); *American Roller Co.* v. *Budinger*, 513 F.2d 982, 985 n.3 (3d Cir. 1975). In practice, there may not be much difference between these formulations.

An abuse of discretion standard might well be appropriate in the present case, where resolution of the disqualification motion turned on the district court's largely subjective judgment whether respondent's representation of Home was likely to affect the vigor of his representation of plaintiffs below and where there are no countervailing public policy considerations like those that may arise in a criminal case. The district court's unique familiarity with counsel's performance and predictions about the course of the litigation would necessarily play a significant role in the disqualification decision. In other situations—such as where the attorney's representation may adversely affect a prior client in a substantially related case and that client has *not* given his consent—a more exacting standard of review would be appropriate. In those cases, the usual "clearly erroneous" standard should be applicable on questions of fact, but the appellate court should carefully scrutinize the district court's application

CONCLUSION

The order denying disqualification was not appealable in this case, and the court of appeals properly declined to reverse the district court's order denying disqualification.[28]

Respectfully submitted.

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of controlling standards of disqualification. See, *e.g.*, *Brennan's, Inc.* v. *Brennan's Restaurants, Inc.*, 590 F.2d 168, 171 (5th Cir. 1979).

[28] We do not recommend a particular disposition because we take no position on the question whether the court of appeals properly reached the merits in this case after concluding that orders denying disqualification of counsel are not appealable.

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